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UNITED STATES GOVERNMENT
National Labor Relations Board

Memorandum

TO : Glenn A. Zipp, Director Region 33
Emil C. Farkas, Director Region 9

DATE: June 8, 1979

RELEASE

FROM : Harold J. Datz, Associate General Counsel
Division of Advice

SUBJECT: Thatcher Plastic Packaging, Div. of Dart Industries, Inc.
Case 33-CA-4158

Premier-Thermo Plastice Company Division of Reichhold Chemicals, Inc.
Case 9-CA-13676

530-6067-6000
530-6067-6001-370
530-6067-6033-750
530-6067-6067-760
530-8054-0133
530-8054-0167
530-8054-2000

These cases were submitted for advice as to whether an employer's duty under Section 8(a)(5) to furnish the incumbent union information relevant to the effectuation of its collective bargaining obligations extended to granting permission for a plant inspection by the union's occupational safety and health experts.

FACTS

Thatcher Plastic Packaging

The Employer manufactures cellulose and plastic. Employees have recently been experiencing dermatitis, headaches, nausea, stomach cramps and sore throats. The Employer and the incumbent Union (International Chemical Workers Union and its Local No. 376) have had a series of discussions on health issues over the past year.

In January 1979, the Union requested that the Employer provide it with written information concerning the plant's chemical substances and their alleged hazards, and environmental and medical monitoring. 1/ In addition, the Union sought and was denied access for its experts to conduct a safety and health inspection of the plant.

1/ The Region has concluded that complaint should issue with respect to the Employer's refusal to fully comply with the Union's request for written information, and does not seek advice on this issue.

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The applicable collective bargaining agreement provides for a Safety and Sanitation Committee made up of representatives of the Employer and employee representatives of the Union. This Committee has authority to hold meetings, make inspections, and file grievances. There is no express provision in the contract relating to access to the plant for Union experts.

The Union alleges that the Employer's refusal to grant access to a non-employee expert for the purpose of making a safety and health inspection is a violation of the duty to bargain under Section 8(a)(5) of the Act.

Premier-Thermo Plastics

The Employer manufactures chemical and plastic products. Two employees have died allegedly because of excessive lead toxification. In addition, allegedly because of lead toxification, three other employees have elevated blood lead levels; one employee has lung cancer; and one employee has hearing difficulties.

In October - November 1978, the Employer provided the incumbent Union (International Chemical Workers, Local 604) with written information concerning medical records and health standards at the plant. The Union then filed a complaint with the state occupational safety and health agency which, in January 1979, cited the plant for violations of state standards, including lead exposure.

In February and March 1979, the Union sought and was denied access for its experts to conduct a safety and health inspection of the plant. The Union also filed a complaint with the federal occupational safety and health agency.

The applicable collective bargaining agreement provides that the Employer will take all reasonable precautions with respect to health and safety, including X-rays and laboratory tests for work related diseases. The contract has no express provision relating to plant access for Union experts.

The Union alleges that the Employer's refusal to allow the expert safety and health inspection is a violation of the Section 8(a)(5) duty to bargain.

ACTION

It was concluded that complaint should issue, absent settlement, against Thatcher Plastic Packaging, Div. of Dart Industries, Inc., and Premier-Thermo Plastics Company Division of Reichhold Chemicals, Inc., on the ground that these Employers violated Section 8(a)(5) and (1) of the Act by denying access to Union experts for the purpose of conducting health and safety inspections at the respective plants.

It was initially concluded that health and safety standards in the workplace are essential parts of employees' terms and conditions of employment and are, therefore, a mandatory subject of collective bargaining. 2/ This is especially true in cases such as these where employees are working in an industry (i.e. plastics) of acknowledged health hazards 3/ and are currently experiencing health problems.

2/ The seminal Board case in this area, Gulf Power Company, 156 NLRB 622 (1966), enf'd. 384 F.2d 822 (5th Cir. 1967), deals specifically with safety provisions. However, it would be argued that unhealthy conditions at a plant can be as harmful to the well-being of the employee as unsafe conditions at a plant. Accordingly, health conditions, no less than safety conditions, should be considered as Section 8(d) subjects. In addition, it should be noted that, particularly in recent years, there has been mounting national concern about health conditions at the workplace. Of importance in this connection was the passage of the Occupational Safety & Health Act (OSH Act), 29 U.S.C. §§ 651-678, in 1970. Many commentators have noted the urgency of the occupational health issue and the problems posed by lack of knowledge and expertise. See generally, Nicholas A. Ashford, Crisis in the Workplace: Occupational Disease and Injury (Ashford), at 15-17, 83-88, 96-107; Blumrosen, et al., Injunctions Against Occupational Hazards: The Right to Work Under Safe Conditions, 64 Cal. L. Rev. 702, 717 (1976); Oversight of the Administration of the Occupational Safety and Health Act, 1978: Hearings on Public Law 91-596 before the Subcommittee on Labor of the Senate Committee on Human Resources, 95th Cong., 2d Sess., 35-51 (statement of Hon. F. Ray Marshall, Secretary, U.S. Department of Labor).

3/ See Ashford at 87; see also 29 C.F.R. § 1910.1017 (federal regulation of employee exposure to vinyl chloride, now recognized as an occupational carcinogen and widely used in the plastics industry since the 1950's).

Given the proposition that health matters are Section 8(d) subjects, it follows that the Employer has the obligation to furnish information to the Union concerning this subject, absent a waiver of the right to the information. And, it is clear that, absent a waiver, the duty to provide information includes the duty to permit reasonable inspections so that relevant first-hand information can be gleaned therefrom.

There is no evidence that the Unions in these cases clearly and unmistakably waived their statutory right to demand plant access for the purpose of an expert safety and health inspection. 4/ The mere existence of some safety and health provisions in the respective agreements is not conclusive that the parties bargained over the entire subject of employee safety ahd health, including rights to information and access, and agreed that such rights would be waived. With respect to terms and conditions of employment, such as health and safety at issue here, the Act imposes on parties to a collective bargaining agreement a continuing bargaining obligation as to "unwaived" 8(d) subjects. 5/ And, a strict waiver will not lightly be inferred. 6/ The respective agreements do not expressly deal in any manner with safety and health inspections by non-employee Union experts, and their silence cannot be construed as a Union waiver of such right. 7/ Accordingly, the Employers in these cases were under a continuing statutory obligation

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4/ See, e.g., N L Industries, 220 NLRB 41 (1975); Perkins Machine Co., 141 NLRB 98 (1963); T.T.P. Corp., 190 NLRB 240 (1971); Bonded Draying Service, 220 NLRB 1015 (1975); General Electric Co., 173 NLRB 164 (1968), enf'd., 414 F.2d 918 (4th Cir. 1969), cert. denied, 396 U.S. 1005 (1970).

5/ See Proctor Manufacturing Corp., 131 NLRB 1166, 1169 (1961); The Jacobs Manufacturing Co., 94 NLRB 1214, 1217, 1219 (1951), enf'd., 196 F.2d 680 (2d Cir. 1952).

6/ See Beacon Piece Dyeing & Finishing Co., Inc., 121 NLRB 953, 956 (1958); see also the cases cited herein at n. 4, supra.

7/ See Fafnir Bearing Company v. N.L.R.B., 362 F.2d 716, 722 (2d Cir. 1966); T.T.P. Corp., supra, 190 NLRB at 244.

to provide that safety and health information necessary for the respective Unions to properly and intelligently perform their duties in the general course of bargaining. 8/ Such an obligation exists even in the absence of current negotiations or grievance processing because a labor organization is not required to "play blindman's bluff" with either potential grievances or the formulation of its bargaining position in future negotiations. 9/

Furthermore, it is clear that the issue involved here, plant health dangers, is adequately technical 10/ so that written data should be supplemented by a live study. Thus, the Board and courts have held that expert access is appropriate where the information sought by the labor organization is too sophisticated to be left to the unskilled observation and recollection of employees, 11/ or where written data cannot be reliably evaluated. 12/ Moreover, this principle has previously been applied to plant inspections by union experts who examined a broad range of conditions, including provisions for health and safety. 13/

8/ See Western Massachusetts Electric Co., 234 NLRB No. 19, sl. op. p. 5 (1978), enf'd., 100 LRRM 2315 (1st Cir. 1978).

9/ Ibid., sl. op. pp. 5-6. It is also evident that the information sought by the respective Unions meets the Board's "liberal discovery-type standard" of relevance to their collective bargaining responsibilities. See Westinghouse Electric Corp., 239 NLRB No. 19, sl. op. pp. 4-5 (1978). In addition to using the information for potential grievances and for future bargaining, there is a suggestion that the Union may wish to use the information to enforce state or federal health laws and regulations. However, the mere fact that this may be one of the Union's purposes does not preclude the Union from obtaining the information. See Westinghouse, supra. As noted infra, there is no evidence that the Union is seeking the information on behalf of any governmental entity.

10/ See generally Ashford, supra.

11/ See Waycross Sportswear Inc. v. N.L.R.B., 403 F.2d 832, 836 (5th Cir. 1968). See also General Electric Co., supra; Fafnir Bearing Co. v. N.L.R.B., supra, 362 F.2d at 721.

12/ See West Coast Casket Co., Inc., 192 NLRB 624, 638 (1971), enf'd., 68 LC ¶12,577 (9th Cir. 1972).

13/ See Triangle Plastics, Inc., 191 NLRB 347, 350-351 (1971); Winn-Dixie Stores, Inc., 224 NLRB 1418, 1443-1444 (1976), enf'd., 567 F.2d 1343 (5th Cir. 1978).

It was also noted that the Board and courts have previously examined and rejected various assertions by employers that they had a legitimate interest in excluding a labor organization's experts from the plant (e.g., a potential for revelation of trade secrets or disrupting production). 14/ Similarly deficient are assertions of employer property rights. 15/ Furthermore, the Supreme Court has indicated that an employer's expectation of privacy with respect to occupational safety and health does not extend to what employees observe in their daily functions. 16/ An occupational safety and health expert, as agent for a statutory representative of employees, may fall within the ambit of this language, especially given the primacy of the Act's purpose to allow employees to select their own representatives for collective bargaining purposes.

Finally, it was noted that these cases do not present a proper subject for deferral to the Occupational Safety and Health Administration, U.S. Department of Labor. The Memorandum of Understanding between that Agency and the Office of the General Counsel, specifically limits deferral to issues arising under Section 11(c) of the OSH Act, 29 U.S.C. § 660(c), which deals with discharge and discrimination for pursuing rights afforded under the OSH Act. 17/ This understanding has no bearing on a labor organization's statutory right to information necessary for the proper conduct of its collective bargaining duties under the NLRA.

14/ See General Electric Company (Youngstown Lamp Plant), 180 NLRB 27, 30-31 (1969); Fafnir Bearing Co. v. N.L.R.B., supra, 362 F.2d at 721. Since the Employer has come forward with no legitimate and substantial justification for denying access, the Supreme Court's decision in Detroit Edison Co. v. N.L.R.B., ___ U.S. ____, 100 LRRM 2728 (1979), does not apply. See GC Memo. 79-22, dated April 9, 1979.

15/ See Fafnir, supra, 362 F.2d at 722. See also Republic Aviation Corp. v. N.L.R.B., 324 U.S. 793, 802, n. 8 (1945).

16/ See Marshall v. Barlow's Inc., 98 S. Ct. 1816, 1821 (1978). In other respects, the Barlow case is inapposite, as it deals with governmental intrusion onto private property. There is no evidence in this case that the Union was "fronting" for any governmental entity.

17/ See 89 LRR 184 (General Counsel's Memorandum 75-29, dated June 24, 1975).

Moreover, the Board has held that state and federal regulatory laws "merely establish certain minimum requirements in their respective fields as conditions of doing business and are not intended to preempt their fields of regulation to such an extent as to exclude them from the concept of collective bargaining." 18/ In addition, the OSH Act itself contains explicit non-exclusionary language with respect to rights afforded by other statutes in relation to occupational safety and health issues. 19/

Based upon the above analysis, further proceedings under Section 8(a)(5) were considered warranted, absent settlement, in both of the instant cases.

HJ.D.

18/ Gulf Power Company, supra, 156 NLRB at 626.

19/ See 29 U.S.C. § 653(b)(4).